Petition

81-1325

Office - Supreme Court, U.S.
FILED
JAN 13 1982
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES E. GRAHAM
CHARLES McLAIN - - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HARDIN COUNTY, KENTUCKY

JACK M. LOWERY
DANIEL B. BOONE
HOLLIS L. SEARCY
231 South Fifth Street
Louisville, Kentucky 40202
Counsel for Petitioners

WESTERFIELD-SONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Were the Petitioners' Fourteenth Amendment rights violated when they were prosecuted by an attorney who individually and privately represented members of the Kentucky State Police in the civil damage suit brought by the Petitioners against the police and also represented the widow of the slain state trooper in two separate million dollar wrongful death suits against the Petitioner, Graham?

2. Did the trial court violate the Petitioners' Sixth Amendment right to a speedy trial by granting the Commonwealth an indefinite continuance and where no effort was made by the Commonwealth to bring the criminal charges against the Petitioners on for trial until more than a year had elapsed and not until after the Petitioners sued members of the Kentucky State Police for damages arising out of a violation of their civil rights?

3. Were the Petitioners' Fourteenth Amendment rights violated when they were forced to trial without proper notification of the criminal charges against them?

4. In light of the relentless pre-trial publicity, were the Petitioners' Fourteenth Amendment rights violated when the trial court overruled their written motion for a change of venue?

5. Were the Petitioners' Fourteenth Amendment rights violated when the trial court entered a judgment of conviction for the offense of resisting arrest even though the Commonwealth failed to prove essential elements of that offense?

TABLE OF CONTENTS

PAGE

Questions Presented i

Table of Contents ..... ii–iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved ... 2– 3

Statement of the Case 3–13

Reasons for Allowance of the Writ 13–18

The Petitioners' 14th Amendment Rights Were Violated When They Were Prosecuted by an Attorney Who Individually and Privately Represented Members of the Kentucky State Police in the Civil Damage Suit Brought by the Petitioners Against the Police, and Who Also Represented the Widow of the Slain State Trooper in Two Separate Million Dollar Wrongful Death Suits Against the Petitioner Graham 13–14

The Trial Court Violated the Petitioners' 6th Amendment Right to a Speedy Trial by Granting the Commonwealth an Indefinite Continuance, Where No Effort Was Made by the Commonwealth to Bring the Criminal Charges Against the Petitioners on for Trial Until More Than a Year Had Elapsed and Not Until After the Petitioners Sued Members of the Kentucky State Police for Damages Arising Out of a Violation of Their Civil Rights 15–16

The Petitioners' 14th Amendment Rights Were Violated When They Were Forced to Trial Without Proper Notification of the Criminal Charges Against Them 16

PAGE

In Light of the Relentless Pretrial Publicity, the Petitioners' 14th Amendment Rights Were Violated When the Trial Court Overruled Their Written Motion for a Change of Venue 17

The Petitioners' 14th Amendment Rights Were Violated When the Trial Court Entered a Judgment of Conviction for the Offense of Resisting Arrest Even Though the Commonwealth Failed to Prove Essential Elements of That Offense 17–18

Conclusion 19

Appendix 21–55

Judgments, Hardin District Court, 12-3-80 21–29

Opinion and Order, Hardin Circuit Court, 6-24-81..30–53

Order Denying Discretionary Review, Court of Appeals of Ky., 8-25-81 54

Order Denying Motion for Discretionary Review, Supreme Court of Ky., 11-17-81 55

TABLE OF AUTHORITIES

PAGE

People v. *Jiminez*, Col., 528 P. 2d 913 (1974)..... 14

Prosser on Torts, Sec. 115 at 876 (3rd Ed., 1964)..... 14

State v. *Cox*, 246 La. 748, 167 S. 2d 352 (1964)..... 14

Granger v. *Peyton*, 379 F. 2d 709, 4th Cir. (1967)..... 14

Williams v. *New York*, 337 U. S. 241, 93 L. Ed. 1337, 60 S. Ct. 1079 (1949)..... 16

Sheppard v. *Maxwell*, 384 U. S. 333, 16 L. Ed. 600, 86 S. Ct. 1507 (1966)..... 17

Thompson v. *Louisville*, 362 U. S. 199, 4 L. Ed. 654, 80 S. Ct. 624 (1960)..... 18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

JAMES E. GRAHAM
CHARLES MCLAIN - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HARDIN COUNTY, KENTUCKY

Petitioners, James E. Graham and Charles McLain, respectfully pray that a Writ of Certiorari issue to review the Opinion of the Circuit Court of Hardin County, Kentucky, entered on June 24, 1981.

OPINIONS BELOW

The Opinion of the Circuit Court of Hardin County, Kentucky, affirming Petitioners' conviction was rendered on June 24, 1981, in an unpublished opinion. On the 25th day of August, 1981, the Court of Appeals of Kentucky denied the Petitioners' Motion for Discretionary Review. On November 17, 1981, the Supreme Court of Kentucky denied the Petitioners' Motion for Discretionary Review.

JURISDICTION

The Opinion of the Circuit Court of Hardin County, Kentucky was rendered on June 24, 1981. The Petitioners unsuccessfully sought to have this Judgment reviewed by both the Court of Appeals of Kentucky and the Supreme Court of Kentucky. They have thus fully exhausted their state remedies. The jurisdiction of this Court is invoked under the provisions of 28 USC § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 6th Amendment to the United States Constitution, in pertinent part, provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation. . . ."

The 14th Amendment to the United States Constitution, in pertinent part, provides:

> ". . . nor shall any state deprive any person of property . . . without due process of law."

KRS 520.090 provides in pertinent part as follows:

> (1) A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color

of his official authority, from effecting an arrest of the actor or another by:

(a) Using or threatening to use physical force or violence against the peace officer or another; or

(b) Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

(2) Resisting arrest is a Class A misdemeanor.

KRS 502.010 provides in pertinent part as follows:

"'Physical force' means force used upon or directed toward the body of another person and includes confinement."

The official Commentary to KRS 520.090 provides as follows:

"The offense of resisting arrest includes forcible resistance and excludes other forms of nonsubmission to authority. Neither flight from arrest nor passive resistance are punishable under this section since a peace officer has the available remedy of use of reasonable force to effect the arrest. Criminal sanctions are, therefore, needed only when interference with arrest poses a direct threat to the safety of the officer or of another person."

STATEMENT OF THE CASE

On the early evening of November 7, 1979, Trooper, Eddie Harris, of the Kentucky State Police was shot and killed by an unknown assailant or assailants. The

discovery of the trooper's body triggered one of the most massive and highly publicized manhunts that ever occurred within the Commonwealth of Kentucky.

There were no credible eye witnesses to the shooting but some three miles south of the scene was discovered an abandoned automobile containing identification papers in the name of Clyde Daniel Graham. Clyde, who resided with his father, step-mother and brothers, in Elizabethtown, Kentucky, thus became a prime suspect.

The proof is undisputed that at approximately 9:00 p.m., five armed officers proceeded to the Graham residence and demanded admittance for the purpose of searching for Clyde. Jimmy, Clyde's younger brother, who was babysitting at the time, advised the officers that he was alone in the house with two small children and that Clyde had not been there for several hours. Unwilling to take his word, the officers, without a search warrant, forced their way into the house and searched from top to bottom in an effort to find Clyde. Jimmy testified that he was beaten and threatened by the troopers. The officers then left the residence, secretly stationing other troopers in the immediate vicinity so that the Graham residence could be kept under constant surveillance.

Shortly before midnight, Buddy Graham, Clyde's father, and Charles McLain, Clyde's cousin, arrived at their Elizabethtown home from Louisville, where they had been the entire evening. At the same time three female relatives of Clyde also arrived at the Elizabethtown residence. The women, returning from a trip

from Tennessee, had heard radio news bulletins indicating that Clyde was wanted as a suspect in the killing. They had decided to go to the Graham residence to offer any possible assistance. The five individuals entered the house and were immediately advised by Jimmy of the earlier search as well as the threats and beatings he had sustained at the hands of the Kentucky State Troopers. Buddy immediately went to the phone and called Dwight Preston, the Hardin County Attorney and requested assistance and protection. Mr. Preston's only reply was that he would look into the matter and that there was nothing he could do for the moment. Several minutes elapsed whereupon the occupants of the house became aware of bright lights shining from the front yard into the house. A voice came over the bullhorn, "come out with your hands up or we'll open fire."

The Grahams filed out of the front door. Positioned about the house were numerous police cars. Scores of state troopers and other peace officers (some witnesses estimated their number to approach 100), carrying shot guns, pistols, magnums, and automatic rifles, had surrounded the premises. As the Grahams filed out the front door, the three women went to the left and the three men, Buddy Graham, Charles McLain, and Jimmy Graham, went to the right. The six individuals were ordered to lie flat upon the ground. The reason for this order, according to the State Police, was to protect the six individuals in the event that Clyde was still in the house and a shoot-out occurred. All witnesses agreed that the Grahams were unarmed

and that all had their hands up (the one exception being Buddy Graham according to the State Police) as they filed out the front door of the house.

The three men later testified at their resisting arrest trial that they offered absolutely no physical resistance of any kind in the face of a virtual army of armed police officers. The police witnesses for the prosecution at the trial claimed that Buddy Graham failed to comply with their command to lie on the ground and swung his arms about to avoid the placing of handcuffs upon him. Significantly, however, there was no testimony at the trial that any police officer ever advised Buddy Graham that he was under arrest, nor was there any evidence that Buddy Graham ever attempted to direct physical force against the body of any police officer.

The police testimony against Charles McLain at the resisting arrest trial was that Charles McLain attempted to rise from the ground presumably to assist Buddy Graham. The troopers responded promptly by striking Charles McLain in the head with a flashlight and placing handcuffs upon him. Again, there was no evidence that Charles McLain even attempted to direct physical force against any peace officer prior to his being taken into custody that night.

Jimmy Graham was also later charged with resisting arrest. At the trial, there was produced no witnesses of any resistance of any kind on his part, and he was acquitted.

Buddy Graham, Charles McLain and Jimmy Graham were severely beaten and abused by various

peace officers. Clear evidence of this fact at the trial included television news footage showing Jimmy Graham and Charles McLain literally covered with blood. Snap shots of Buddy Graham and medical records confirm that his face and head sustained a severe beating.

A newspaper reporter for the Louisville Courier-Journal even testified at trial that he saw a peace officer strike Charles McLain after the handcuffs had been placed upon him.

The three women, Faye Manion, Shelby Manion and Rose Ella McLain, were forced at gun point by the peace officers upon exiting the house, to lie face down on the ground. The women were not physically beaten, but were the victims of severe verbal abuse. The women were denied their freedom for several hours while warrantless searches were conducted and gestapo like interrogations continued.

Although the three men were beaten and taken into custody around midnight on November 7, 1979, Buddy Graham and Charles McLain were not lodged in the Hardin County Jail until the morning of November 8, 1979, an hour or two before Court convened. Jimmy Graham's injuries received in the beatings required his hospitalization. After Buddy and Charles finally were incarcerated, they learned that the police officers had charged them with the offense of resisting arrest. The officers had merely issued uniform citations stating that the Defendants committed the offense of "resisting arrest". No other facts in support of the charges were ever included in any written notification of the criminal charges.

Within the next day or two, Buddy Graham, Charles McLain, Jimmy Graham, Faye Manion, Shelby Manion and Rose Ella McLain all filed individual "complaints" with the local FBI in Louisville. The physical and verbal abuse administered by the state police and others was handwritten in detail in sworn statements.

On December 7, 1979, Sgt. Eugene Coffey, a high ranking state trooper assigned to the Elizabethtown post, located the suspect, Clyde Daniel Graham, in a motel in Effingham, Illinois. Coffey appeared at Clyde Graham's door, then as soon as it was opened, shot and killed him point blank with a 357 magnum pistol. An autopsy later performed showed that Clyde was shot once in the stomach and once in the back. Official investigations revealed that Clyde was unarmed at the time of his death.

Following the killing of Clyde Graham in December of 1979, this case began to receive substantial media coverage on a regional if not national level. The case from its inception in November, 1979, has been covered on almost a daily basis by local Elizabethtown, Hardin County, and Louisville news media.

The resisting arrest case of the Commonwealth of Kentucky vs. Buddy Graham and Charles McLain was set for trial on the docket of the Hardin County, Kentucky, District Court on December 28, 1979. However, the prosecution decided against proceeding on the charges in District Court and the Hardin District Court on Motion of the prosecutor entered an Order striking the case from the docket and continuing it

"generally". No effort whatsoever was made by the Commonwealth of Kentucky to prosecute this case until November of 1980, almost a year later. Perhaps the event that triggered renewed interest in obtaining convictions against Buddy Graham and Charles McLain was their filing in September of 1980 of a civil rights damage suit for injuries received in the aforesaid beatings.

Prior to the resisting arrest trial, Buddy Graham and Charles McClain made three procedural due process motions, all of which were overruled. First of all, the Defendants moved for a dismissal on the ground that their rights to a speedy trial under the United States Constitution were violated. Secondly, the Defendants objected to the prosecution of the case by attorney, Larry Raikes. Mr. Raikes was not a County or a Commonwealth Attorney, but was private counsel employed and paid by various Kentucky State Troopers to defend them in the civil rights action arising from the same facts.

Mr. Raikes' employment as defense counsel for various peace officers was only the tip of the iceberg insofar as his active involvement in the Graham case is concerned. He also was employed by the widow of Trooper, Eddie Harris, to prosecute two separate wrongful death actions against Buddy Graham.

Finally, Buddy Graham and Charles McLain moved the trial court for a change of venue in light of the obvious and relentless media coverage their case had received in Hardin County. Some of the evidence of the pre-trial publicity of the case included the following:

A. Numerous articles in the Hardin County newspapers that were accusatory in nature and derogatory to the Grahams.

B. Various radio and television reports of all aspects of the case.

C. There was evidence of a Hardin County "parade" that was organized by the local law enforcement community. This "parade" consisted of hundreds of private automobiles that slowly drove by the Graham home demonstrating antagonistic feelings toward the Grahams. The parade even contained a truck bearing a mock coffin with the names of a Louisville newspaper publisher and a local reporter. The reporter was awarded a coffin because he had testified earlier on behalf of the Grahams.

The most flagrant episode of pre-trial publicity directed against the Grahams occurred only hours before the resisting arrest trial. The specially appointed "prosecutor", private attorney, Larry Raikes, along with his client, the widow of the deceased state trooper, Brenda Harris, gave an interview that was aired over the local radio station. The tape recording of this interview was introduced as evidence in support of the Motion of Graham and McLain for a change of venue. A transcript of this recording, which also demonstrates the improper conflict of interest on the part of Mr. Raikes, is as follows:

> "The Hardin District Court, Buddy Graham and his son and his nephew are scheduled to stand trial on disorderly conduct and resisting arrest

charges resulting from a search of the Graham home the night Trooper Eddie Harris was shot in Larue County. Earlier this year in Federal Court in Louisville, the elder Graham was found not guilty of concealing his son, Clyde, who was wanted by police in connection with Harris' death. This marks the first time Graham has been tried in Hardin County on charges resulting from the Harris incident. When Trooper Harris was shot he left a wife and three children. We spoke with Brenda Harris and asked her if she intended to go to the trial.

(Brenda) I'll be there as long as the court last, I'll be there. My children will be there.

It's been over a year now since Harris was killed, how has his family adjusted?

(Brenda) It's been a long hard year, but I think that we have adjusted well considering that we're reminded of Eddie's murder almost constantly by the newspaper, the news media and everytime we go to Hodgenville to visit our friends and relatives we have to go by the Graham house. Eddie, he's gone and we've accepted that, but we have not accepted the fact that he was gunned down in cold blooded murder, and my only concern right now is for the troopers. They've been crucified over this whole case, and they've been under a great deal of pressure, but they haven't given up and they won't quit because they know that they are right.

In another development in the Graham case, Hodgenville attorney, Larry Raikes, has added the names of Buddy Graham and Carolyn Goodman to that of Clyde Graham in a million dollar wrongful death lawsuit he has filed in behalf of Brenda

> Harris. Raikes said he recently traveled to Lewistown, Pennsylvania to take the deposition of Michael Coke, of the Pharminex Company, who told Raikes he had shipped six packages of caffein pills to James E. 'Buddy' Graham between September 19 and October 9, 1979. Raikes said UPS has confirmed the packages were delivered COD to Graham, who paid thirty four hundred dollars in cash for the pills. The night of the shooting Clyde Graham was allegedly carrying caffein pills in Carolyn Goodman's car when he was stopped by Harris."

The federal questions sought to be reviewed were raised as follows:

A. Petitioners raised the question of their denial of a speedy trial under the United States Constitution by written motion before trial.

B. Petitioners raised the question concerning prejudicial pre-trial publicity as a due process violation by a written motion for change of venue before trial.

C. Petitioners raised the question of prosecutorial misconduct or conflict of interest as a denial of due process by oral objections before trial.

D. Petitioners raised the question of whether they were denied due process of law under the United States Constitution in being convicted of resisting arrest in the absence of evidence of all elements of that offense by motions for a directed verdict and in subsequent appeals.

E. Petitioners raised the question of whether they were denied due process of law under the United States

Constitution by being forced to trial without proper notification of the criminal charges in their appeal as of right to the Hardin Circuit Court.

All of the above federal questions were raised by the Petitioners and brought to the attention of the Kentucky Court of Appeals and the highest Court of Kentucky, the Kentucky Supreme Court. Both courts denied the Petitioners' Motions for Discretionary Review.

REASONS FOR ALLOWANCE OF THE WRIT

The Petitioners' 14th Amendment Rights Were Violated When They Were Prosecuted By an Attorney Who Individually and Privately Represented Members of the Kentucky State Police in the Civil Damage Suit Brought By the Petitioners Against the Police, and Who Also Represented the Widow of the Slain State Trooper in Two Separate Million Dollar Wrongful Death Suits Against the Petitioner, Graham.

We are frank to admit to the Court that we cannot understand why the Court of Appeals of Kentucky and the Supreme Court of Kentucky decided that the above issue did not merit discretionary review. The only conceivable reason in our judgment for this failure by the Kentucky appellate courts is that the Supreme Court of the United States has not specifically held that this type of prosecutorial misconduct denies a defendant his fundamental due process rights. The case at bar presents an opportunity for the Supreme Court of the United States to denounce the abomination that occurred in the Hardin County District Court.

The Petitioners below were faced with a specially appointed prosecutor who at one and the same time was the attorney of record in a civil damage suit brought against Graham and was a lead counsel in the defense of numerous state troopers in the civil rights litigation brought by the Petitioners against members of the Kentucky State Police arising out of the same facts that formed the basis for the criminal prosecution. Mr. Raikes was attempting to serve two masters, his private clients on the one hand and the citizens of the Commonwealth of Kentucky, including the Petitioners, on the other. This practice has been specifically condemned time and time again by the authorities that have been confronted with the issue. *People* v. *Jiminez,* Col., 528 P. 2d 913 (1974); Prosser, Torts, Sec. 115 at 876 (3rd Ed., 1964); *State* v. *Cox,* 246 La. 748, 167 S. 2d 352 (1964).

This practice not only has been condemned by courts applying common law principles but it has also been specifically held a violation of federal due process rights. The 4th Circuit U. S. Court of Appeals in *Granger* v. *Peyton,* 379 F. 2d 709 (1967), held as follows:

> "We think the conduct of this prosecuting attorney in attempting at once to serve two masters, the people of the Commonwealth and the wife of Granger, violated the requirements of fundamental fairness assured by the Due Process Clause of the 14th Amendment."

The Trial Court Violated the Petitioners' 6th Amendment Rights to a Speedy Trial By Granting the Commonwealth an Indefinite Continuance Where No Effort Was Made By the Commonwealth to Bring the Criminal Charges Against the Petitioners On for Trial Until More Than a Year Had Elapsed and Not Until After the Petitioners Sued Members of the Kentucky State Police for Damages Arising Out of a Violation of Their Civil Rights.

The violations of the Petitioners constitutional rights complained of here are simply another manifestation of the fact that the biased special prosecutor and the members of the Kentucky State Police used the Hardin District Court as an instrument of oppression rather than as a court of justice.

On November 8, 1979, the Defendants were issued their citations. When the case was next called on December 28, 1979, the Commonwealth moved to continue the cases "generally" and remanded them from the docket. The Commonwealth made no effort to bring these charges on for trial until after the Petitioners had filed a civil damage suit against members of the Kentucky State Police for the beatings inflicted upon them on the evening of November 7, 1979. In obvious retaliation, the special prosecutor finally brought these charges to trial in late November of 1980. The Court should also be advised that in the interim between November, 1979 and November, 1980, the Petitioner was forced to endure a federal prosecution in the U. S. District Court for the Western District of Kentucky, in which he was charged with the federal

offense of harboring a fugitive from justice, namely, his son, Clyde Daniel Graham. It is rare indeed for a father to be charged with harboring his own son and it took the federal jury after a trial of almost a week, 11 minutes to return a unanimous not guilty verdict. The effect of these multiple prosecutions has been to diminish and destroy Petitioners financial resources. We believe it to be amply evident that the constitutional concept of fair play has been heretofore ignored by both the federal and state prosecutors.

The Petitioners' 14th Amendment Rights Were Violated When They Were Forced to Trial Without Proper Notification of the Criminal Charges Against Them.

The Supreme Court of the United States has held that the due process clause of the 14th Amendment mandates reasonable notice of the criminal charges to every criminal defendant. *Williams* v. *New York,* 337 U. S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949).

The only written notice provided the Petitioners prior to trial were traffic citations merely stating they were charged with "resisting arrest" and "disorderly conduct". No further facts or details were provided and as a result, the Petitioners once again found themselves at the mercy of the special prosecutor and his clients, the state troopers, as to the details of their alleged criminal conduct.

In Light of the Relentless Pretrial Publicity, the Petitioners' 14th Amendment Rights Were Violated When the Trial Court Overruled Their Written Motion for a Change of Venue.

The Petitioners have already set out the nature of the massive pre-trial publicity accorded this case. Some of it was generated by the special prosecutor on the very eve of trial. The Supreme Court of the United States in *Sheppard* v. *Maxwell,* 384 U. S. 333, 16 L. Ed. 600, 86 S. Ct. 1507 (1966), clearly held that the Defendant, Sheppard, was denied a fair trial consistent with the Due Process Clause of the 14th Amendment as a result of massive, pervasive prejudicial publicity attending his prosecution. The Court also held that identifiable prejudice to the accused need not be shown where the totality of the circumstances raises the probability of prejudice. The case at bar presents such circumstances, and the failure of the trial court to sustain the change of venue motion denied the Petitioners' rights to a fair trial.

The Petitioners' 14th Amendment Rights Were Violated When the Trial Court Entered a Judgment of Conviction for the Offense of Resisting Arrest Even Though the Commonwealth Failed to Prove Essential Elements of That Offense.

Under Kentucky law, passive resistance does not support a conviction of resisting arrest. The gravamen of the offense is the direction of force against the person of the arresting officer. See KRS 520.090 and the official commentary thereto.

In the case at bar the Commonwealth totally failed to introduce any evidence that either of the Petitioners directed force against the "body" of any peace officer. Moreover, neither of the Petitioners were ever told, until hours later, what they were being arrested for or that they were in fact being arrested.

We invite the Court's attention to the case of *Thompson* v. *Louisville,* 362 U. S. 199, 4 L. Ed. 654, 80 S. Ct. 624 (1960), which held that it is a violation of due process to convict a man without evidence of his guilt. This case falls squarely within the *Thompson* holding.

CONCLUSION

We respectfully submit to the court that the constitutional violations inflicted upon the Petitioners are so basic and fundamental as to amply justify this court in granting certiorari. Our research has failed to reveal a decision of this court which addresses itself to the prosecutorial misconduct issue presented in the case at bar.

One would wish to assume that it would not be necessary to petition the Supreme Court of the United States for relief in view of the blatant nature of the error below. This has not been the case, however, and the Petitioners are left with no other possible source of relief.

Respectfully submitted,

JACK M. LOWERY
DANIEL B. BOONE
HOLLIS L. SEARCY
231 South Fifth Street
Louisville, Kentucky 40202
Counsel for Petitioners

APPENDIX

HARDIN DISTRICT COURT

DIVISION No. 1

Case No. 79-M-1351

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

JAMES DAVID GRAHAM - - - - - *Defendant*

TRIAL, VERDICT AND JUDGMENT—Filed December 3, 1980

CHARGE(S): RESISTING ARREST, DISORDERLY CONDUCT

On the 12th day of November, 1980, the defendant, JAMES DAVID GRAHAM, appeared in open Court with his attorney, HON. G. WILLIAM BAILEY, and the Commonwealth came by attorney.

Thereupon came the following jury, to-wit:

Willie E. Yates	William Adkins
Kenneth Johnson	Mary Blandford
Geneva Shipp	Walter Critchelow
Margaret Cox	

who are duly empaneled and sworn to hear the case upon defendant's plea of not guilty.

Dely Bauer, deputy court clerk of this Court was directed to record the testimony and proceeding of this trial.

Motions and rulings made during the trial are as shown in the official transcript.

Evidence was presented for the Commonwealth and the trial not being completed before the hour of adjournment, the Court admonished the jury and adjourned until 9:00 A.M. on November 14, 1980.

At 9:00 A.M. on November 14, 1980, the trial resumed and evidence was presented for the Commonwealth and the trial not being completed before the hour of adjournment, the Court admonished the jury and adjourned until 9:00 A.M. on November 17, 1980.

At 9:00 A.M. on November 17, 1980, the trial resumed and evidence was presented for the Commonwealth and the defendant and the trial not being completed before the hour of adjournment, the Court admonished the jury and adjourned until 9:00 A.M. on November 18, 1980.

At 9:00 A.M. on November 18, 1980, the trial resumed and evidence was presented for the defendants and rebuttal evidence for the Commonwealth and the trial not being completed before the hour of adjournment, the Court admonished the jury and adjourned until 9:00 A.M. on November 19, 1980.

At 9:00 A.M. on November 19, 1980, the trial resumed and evidence was presented for the Commonwealth and defendant. The Court instructed the jury as to the law in the case and arguments of counsel were presented. The Court directed the Clerk of the Court to draw one name from the box containing the names of the jurors and the clerk drew the name of Margaret Cox as the alternate juror and she was excused from deliberation on the verdict.

The jury retired to deliberate and thereafter at 1:20 P.M. the jury returned into open Court and requested the playing of the testimony of James David Graham which

was done in open Court. The jury retired to deliberate and thereafter the jury returned into open Court the following verdict:

RESISTING ARREST:

"We, the Jury, find the defendant, James David Graham, not guilty."

Willie E. Yates
Foreman

DISORDERLY CONDUCT:

"We, the Jury, find the defendant, James David Graham, not guilty."

Willie E. Yates
Foreman

HARDIN DISTRICT COURT

DIVISION No. I

Case No. 79-M-1349

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

CHARLES McLAIN - - - - - - - *Defendant*

TRIAL, VERDICT AND JUDGMENT—Filed December 3, 1980

CHARGE(S): RESISTING ARREST, DISORDERLY CONDUCT

On the 12th day of November, 1980, the defendant, CHARLES McLAIN, appeared in open Court with his attorney, HON. G. WILLIAM BAILEY, and the Commonwealth came by attorney.

Thereupon came the following jury, to-wit:

Willie E. Yates	William Adkins
Kenneth Johnson	Mary Blandford
Geneva Shipp	Walter Critchelow
Margaret Cox	

who are duly empaneled and sworn to hear the case upon defendant's plea of not guilty.

Dely Bauer, deputy court clerk of this Court was directed to record the testimony and proceeding of this trial.

Motions and rulings made during the trial are as shown in the official transcript.

Evidence was presented for the Commonwealth and the trial not being completed before the hour of adjournment, the Court admonished the jury and adjourned until 9:00 A.M. on November 14, 1980.

At 9:00 A.M. on November 14, 1980, the trial resumed and evidence was presented for the Commonwealth and the trial not being completed before the hour of adjournment, the Court admonished the jury and adjourned until 9:00 A.M. on November 17, 1980.

At 9:00 A.M. on November 17, 1980, the trial resumed and evidence was presented for the Commonwealth and the defendant and the trial not being completed before the hour of adjournment, the Court admonished the jury and adjourned until 9:00 A.M. on November 18, 1980.

At 9:00 A.M. on November 18, 1980, the trial resumed and evidence was presented for the defendants and rebuttal evidence for the Commonwealth and the trial not being completed before the hour of adjournment, the Court admonished the jury and adjourned until 9:00 A.M. on November 19, 1980.

At 9:00 A.M. on November 19, 1980, the trial resumed and evidence was presented for the Commonwealth and defendant. The Court instructed the jury as to the law in the case and arguments of counsel were presented. The Court directed the Clerk of the Court to draw one name from the box containing the names of the jurors and the clerk drew the name of Margaret Cox as the alternate juror and she was excused from deliberation on the verdict.

The jury retired to deliberate and thereafter at 1:20 P.M. the jury returned into open Court and requested the playing of the testimony of James David Graham which was done in open Court. The jury retired to deliberate and thereafter the jury returned into open Court the following verdict:

INSTRUCTION ON RESISTING ARREST:

> We, the Jury, find the defendant, Charles McLain, guilty as charged.

We, the Jury, fix his punishment at confinement in the Hardin County Jail for NONE, or a fine of $250.00, or both _____.

Willie E. Yates
Foreman

INSTRUCTION ON DISORDERLY CONDUCT:

We, the Jury, find the defendant, Charles McLain, guilty as charged.

We, the Jury, fix punishment at confinement in the Hardin County Jail for NONE, or a fine of $125.00, or both confinement and fine.

Willie E. Yates
Foreman

IT IS, THEREFORE, ORDERED AND ADJUDGED that the defendant, Charles M. McLain, is guilty of the crimes of Resisting Arrest and his sentence is fixed at a fine of $250.00 and Disorderly Conduct and his sentence is fixed at a fine of $125.00. The defendant shall pay Court Costs of $25.50.

This 3rd day of December, 1980.

(s) Robert N. Hubbard, Judge
Hardin District Court
Division II

HARDIN DISTRICT COURT

DIVISION No. 1

Case No. 79-M-1350

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

JAMES E. (BUDDY) GRAHAM - - - - *Defendant*

TRIAL, VERDICT AND JUDGMENT—Filed December 3, 1980

CHARGE(S): RESISTING ARREST, DISORDERLY CONDUCT

On the 12th day of November, 1980, the defendant, JAMES E. (BUDDY) GRAHAM, appeared in open Court with his attorney, HON. G. WILLIAM BAILEY, and the Commonwealth came by attorney.

Thereupon came the following jury, to-wit:

Willie E. Yates	William Adkins
Kenneth Johnson	Mary Blandford
Geneva Shipp	Walter Critchelow
Margaret Cox	

who are duly empaneled and sworn to hear the case upon defendant's plea of not guilty.

Dely Bauer, deputy court clerk of this Court was directed to record the testimony and proceeding of this trial.

Motions and rulings made during the trial are as shown in the official transcript.

Evidence was presented for the Commonwealth and the trial not being completed before the hour of adjournment, the Court admonished the jury and adjourned until 9:00 A.M. on November 14, 1980.

At 9:00 A.M. on November 14, 1980, the trial resumed and evidence was presented for the Commonwealth and the trial not being completed before the hour of adjournment, the Court admonished the jury and adjourned until 9:00 A.M. on November 17, 1980.

At 9:00 A.M. on November 17, 1980, the trial resumed and evidence was presented for the Commonwealth and the defendant and the trial not being completed before the hour of adjournment, the Court admonished the jury and adjourned until 9:00 A.M. on November 18, 1980.

At 9:00 A.M. on November 18, 1980, the trial resumed and evidence was presented for the defendants and rebuttal evidence for the Commonwealth and the trial not being completed before the hour of adjournment, the Court admonished the jury and adjourned until 9:00 A.M. on November 19, 1980.

At 9:00 A.M. on November 19, 1980, the trial resumed and evidence was presented for the Commonwealth and defendant. The Court instructed the jury as to the law in the case and arguments of counsel were presented. The Court directed the Clerk of the Court to draw one name from the box containing the names of the jurors and the clerk drew the name of Margaret Cox as the alternate juror and she was excused from deliberation on the verdict.

The jury retired to deliberate and thereafter at 1:20 P.M. the jury returned into open Court and requested the playing of the testimony of James David Graham which was done in open Court. The jury retired to deliberate and thereafter the jury returned into open Court the following verdict:

INSTRUCTION ON RESISTING ARREST:

We, the Jury, find the defendant, James E. (Buddy) Graham, guilty as charged. We, the Jury, fix his punish-

ment at confinement in the Hardin County Jail for NONE, or a fine of $500.00, or both _____.

Willie E. Yates
Foreman

INSTRUCTION ON DISORDERLY CONDUCT:

We, the Jury, find the defendant, James E. (Buddy) Graham, guilty as charged. We, the Jury, fix punishment at confinement in the Hardin County Jail for NONE, or a fine of $250.00, or both confinement and fine _____.

Willie E. Yates
Foreman

IT IS, THEREFORE, ORDERED AND ADJUDGED that the defendant, James E. (Buddy) Graham, is guilty of the crimes of Resisting Arrest and his sentence is fixed at a fine of $500.00, and Disorderly Conduct and his sentence is fixed at a fine of $250.00. The defendant shall pay Court Costs of $25.50.

This 3rd day of December, 1980.

(s) Robert N. Hubbard, Judge
Hardin District Court
Division II

DIVISION I

HARDIN CIRCUIT COURT

No. 80-X-20
No. 80-X-21

JAMES E. GRAHAM and
CHARLES MCLAIN, - - - - - *Appellants,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

OPINION AND ORDER—AFFIRMING IN PART, REVERSING IN PART—Entered June 24, 1981

These consolidated cases are appeals from separate judgments entered by the Hardin District Court, Division II, on December 3, 1980. The judgments were entered pursuant to jury verdicts returned on November 19, 1980 at the conclusion of a lengthy trial. Each Appellant was found guilty of resisting arrest and of disorderly conduct. Appellant Graham was fined $500.00 for resisting arrest and $250.00 for disorderly conduct, and Appellant McLain was fined $250.00 for resisting arrest and $125.00 for disorderly conduct. The charges arose out of an occurrence which took place at the residence of Appellant Graham at approximately 12:30 a.m. on November 8, 1979. From the evidence presented, the jury was entitled to believe the following facts:

Sometime during the early evening hours of November 7, 1979, someone shot and killed Eddie Harris, a Kentucky State Trooper, on U.S. 31-E in Larue County, Kentucky, between the towns of Hodgenville and New Haven. An abandoned vehicle subsequently was found on the same

highway a short distance from the scene of the crime. A check of the vehicle registration number of this vehicle revealed the owner to be Carolyn Goodman, known to the police to be a resident of Appellant Graham's household. A billfold found in the vehicle contained identification cards indicating it belonged to Clyde Graham, Appellant Graham's son. The investigators on the scene also located an eyewitness to the shooting and he gave them a description which fit that of Clyde Graham.

Meanwhile, Harris' body had been taken to Hardin Memorial Hospital. An autopsy was performed by the hospital pathologist, Dr. William Carney, in the presence of State Police Lieutenant Ellis Ross. Carney's autopsy revealed two bullet holes in the head of the victim and it was his initial impression that the bullet holes were made by different calibre bullets, indicating the involvement of more than one weapon and, possibly, more than one killer. This information was immediately relayed to the officers investigating the crime.

Armed with all of this information, Hardin County Deputy Sheriff Charles Logsdon and Kentucky State Police Detective Ronnie Wilson, along with two other detectives and three state troopers proceeded to the Graham residence on Kentucky Highway 61 in Hardin County. A search of the residence revealed only James D. Graham, Appellant Graham's other son, and several small children. (For purposes of identification, James D. Graham will hereafter be referred to as Jimmy Graham and Appellant James E. Graham will hereafter be refered to as Buddy Graham.) From the evidence presented, the jury could find (1) that Jimmy Graham told Wilson that Clyde, Buddy and McLain were all at the residence earlier in the day; (2) that Jimmy Graham left the residence at about noon and when he returned, all three were gone; (3) that the vehicle belonging to Carolyn Goodman was also at the residence earlier in

the day and that when Jimmy returned, it, too, was gone; and (4) that Wilson, Logsdon and/or the other state troopers present at that time advised Jimmy Graham that Clyde, Buddy and McLain were suspects in the killing of Harris. This first visit to the Graham residence by law enforcement officers occurred at approximately 10:00 p.m. on November 7. After the conversation with Jimmy Graham, Wilson reported to the other officers investigating the killing that Clyde, Buddy and McLain possibly were together.

As it turned out, Appellants were not with Clyde Graham, but had gone to Louisville to bail a friend out of jail. Meanwhile, Faye Manion, who is Buddy Graham's sister and Appellant McLain's mother, had been to Tennessee with her daughter, Rosella McLain. Her other daughter, Shelby Manion, had remained that evening with a friend of the family. While there, Shelby heard over the television about the killing of Harris and that Clyde Graham was the prime suspect. When her mother and half-sister arrived to pick her up, she immediately relayed this information to them. Instead of going directly home, they decided to go to Buddy Graham's residence to see if the information was true. They arrived at the residence shortly after midnight and, by coincidence, at almost the exact same time that Buddy Graham and McLain arrived back from Louisville. As both cars pulled into the U-shaped driveway from opposite directions, Jimmy Graham came out of the house to meet them.

Not surprisingly, the state police had the Graham residence under surveillance. Shortly after the two cars arrived at the residence, Sergeant Mickey Anderson drove by and saw all seven people standing out in front of the Graham residence. He was able to identify Buddy Graham by personal knowledge and McClain by physical description. On the basis of the description given of Clyde Graham,

Anderson mistakenly concluded that the third man was Clyde, instead of Jimmy Graham. Anderson broadcast a dispatch to the effect that Clyde, Buddy and McLain were all at the Graham residence and that some women had also arrived. An order was then issued for all state troopers investigating the killing to assemble at Goldie's Hamburger restaurant south of the Graham residence on Highway 61. As the senior officer present, Sergeant Clyde Wyatt selected ten troopers to form an arrest team. A prior search of the Graham residence made three months before had revealed a large cache of weapons in the residence. For this reason, the arrest team members were heavily armed and wearing bulletproof vests in anticipation of a possible shootout. The members of the arrest team included Trooper Hammond, a specialist in barricade situations, Trooper Stiles, a specialist in hostage situations (because women and children were known to be in the house) and Trooper Foster, who could identify the individual members of the Graham family on sight. The other seven team members were the most experienced men at the scene. The arrest team proceeded to the Graham residence in three vehicles, one marked state police vehicle and two unmarked vehicles.

Meanwhile, Buddy Graham telephoned Hardin County Attorney Dwight Preston to complain about the earlier search of his residence and to request Preston to investigate what was going on and let him know. According to Graham, he was to call Preston back in ten minutes. However, just as he called Preston the second time, the arrest team arrived. Spotlights from all three police vehicles were trained on the front of the house and the blue flashing lights on top of the marked vehicle were turned on. Sergeant Wyatt then activated the police cruiser's public address system and announced "This is the State Police — Come out with your hands up," or words to that effect.

The six adults in the residence then came outside one by one. Trooper Foster identified the men as they came out the door. All but Buddy Graham had their hands up. As he came out the front door, Buddy exclaimed "You son-of-a-bitches, I have already called my attorney." Sergeant Sam Stewart then ordered the six adults to lie down on the ground. According to Stewart, he issued this order because of the possibility that "they were all possibly well-armed and dangerous; and since the one was not co-operating." According to Stewart, this is a police precautionary procedure "because it's much more difficult for them to shoot you lying on the ground."

Five of the six Graham family members obeyed the order to lie down on the ground. Buddy Graham went down only to one knee. Sergeant Stewart then shoved him face down against the ground and tried to handcuff him. Buddy exclaimed "Get your goddam hands off me," and attempted to avoid being handcuffed by waving his free arm around and trying to get up. Sergeant Edwards and Trooper Cottrell went to Stewart's assistance and the three of them were able to subdue and handcuff Buddy Graham.

While this was going on, McLain got up off the ground and exclaimed "You son-of-a-bitches can't handcuff me." He was then physically subdued and handcuffed by several troopers on the scene. (After the six adults came out of the house voluntarily, a large number of additional troopers began arriving at the scene, thinking the arrest was completed. The exact number of troopers at the Graham house was never established, although the evidence indicates it was more than a crowd, if less than a multitude.) Meanwhile, several members of the original arrest team were searching the house, where they suspected Clyde Graham to be hiding.

Buddy Graham, Jimmy Graham, and McLain were taken to State Police headquarters in Elizabethtown, where

they were interrogated by Lieutenant Richard McQuown. McQuown verified the Appellants' alibi so they were never formally charged with murder However, Sergeant Wyatt, the arresting officer, did issue citations to all three arrestees for resisting arrest, a Class A misdemeanor, and disorderly conduct, a Class B misdemeanor. These issues were tried by a six person jury, which acquitted Jimmy Graham on both charges and found both Buddy Graham and McClain guilty of both charges. The jury recommended the fines described in the first paragraph of this opinion and judgment was entered pursuant to the verdicts. Appellants raise seven issues on appeal:

1. *Insufficiency of description of the offenses on the citations.*

Appellants claim the mere charges of "Resisting Arrest" and "Disorderly Conduct", without further facts or details, were insufficient to constitute reasonable notification of the criminal charges against them. *See Commonwealth* v. *Melvin,* Ky., 256 S. W. 2d 513 (1953). However, Appellants did not file a motion for a bill of particulars in the trial court. RCr 6.22. Such failure constitutes a waiver of any complaint that they did not know the nature of the charges against them. *Hall* v. *Commonwealth,* Ky., 402 S. W. 2d 701 (1966).

2. *Failure to grant a change of venue.*

After reviewing the affidavits and other evidence presented by both sides, the trial judge overruled the motion for a change of venue. Such a ruling was a matter within his discretion and will not be disturbed unless it is shown that such discretion was not justly and properly exercised under the circumstances. *Smith* v. *Commonwealth,* Ky., 366 S. W. 2d 902 (1962). Undoubtedly, the killing of Trooper Harris and the subsequent related events have received much publicity, not only in Hardin County, but

throughout the Commonwealth of Kentucky. However, the mere fact that jurors may have read, talked or heard about a case is insufficient to support a change of venue, absent a showing that the accounts or descriptions have prejudiced the defendant. *Brewster* v. *Commonwealth,* Ky., 568 S. W. 2d 232 (1978). In fact, such a motion should be granted *only* where the trial judge reaches the conclusion that it is relatively impossible to empanel a jury that has not preconceived an opinion as to the defendant's guilt because of pretrial publicity. *Elswick* v. *Commonwealth,* Ky. App., 574 S. W. 2d 916 (1978). The relative ease with which a jury was empaneled in this case indicates the correctness of the trial judge's decision on this issue. (It was interesting to note that although an interview with the widow of Trooper Harris was broadcast over two local radio stations on the morning of the trial, only one prospective juror had heard the interview.) There is no merit in this aspect of the appeal.

3. *Denial of a speedy trial.*

Suffice it to say no demand for a speedy trial was made prior to September 12, 1980, (if it was made then). The time *before* such a demand is made is not counted as part of the period of delay in determining whether the right to a speedy trial has been violated. *Barker* v. *Wingo,* 442 F. 2d 1141 (6th Cir. 1971), *cert. granted* 404 U. S. 1037, 92 S. Ct. 719, 30 L. Ed. 2d 729, *aff'd* 401 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101. It should also be pointed out that a motion to dismiss for lack of a speedy trial does not have the same effect as a motion for speedy trial. *McDonald* v. *Commonwealth,* Ky., 569 S. W. 2d 134 (1978). Thus, technically, there never was a motion for speedy trial in this case. In fact, the order entered on December 28, 1979 striking the case from the trial docket and continuing it generally, was tendered by counsel for Appellants. Prior

to making the motion to dismiss, Appellants never exerted any effort or made any motion to have this case reset for trial. Thus, they are not now in a position to complain that they were denied their Sixth Amendment rights. *Walker* v. *Commonwealth,* Ky., 561 S. W. 2d 656 (1977).

4. *Failure to disqualify the prosecuting attorneys.*

On November 8, 1979, the Hardin County Attorney disqualified himself and his staff from the prosecution of this case. As a result, the Assistant Commonwealth's Attorney for the Ninth Judicial Circuit, Hugh Roark, was appointed by the Attorney General as special prosecutor. Subsequently, after this appointment and before the trial of this action, Appellants and Jimmy Graham filed a suit against various and sundry law enforcement officers for damages to which they claim to be entitled because of the actions of the police on the night of November 7-8, 1979. One of the defendants named in that suit is Dewey Skaggs, Commonwealth's Detective for the Ninth Judicial Circuit. An answer was filed on behalf of Skaggs by Hobson L. James, Jr., the Commonwealth's Attorney for this circuit. Appellants claim that the filing of this pleading by James disqualified Roark to prosecute this criminal action. Even if it could be shown that the Commonwealth's Attorney was deriving financial benefit from his defense of Skaggs in the civil suit (and it wasn't), certainly there could be no financial benefit to Roark. As a full time Assistant Commonwealth's Attorney, he is prohibited by statute from engaging in the private practice of law. KRS 15.760(3).

However, Attorney Larry Raikes, who has been employed by a number of state troopers to defend them in the federal court action brought by Appellants was also employed by the troopers to assist Roark in the prosecution of this case. It has long been held in Kentucky that it is not against public policy to allow employed private counsel

to assist the public prosecutor in a criminal case. *Earl* v. *Commonwealth,* Ky. App., 569 S. W. 2d 686 (1978); *Goehring* v. *Commonwealth,* Ky., 370 S. W. 2d 822 (1963); *Price* v. *Caperton,* 62 Ky. 207 (1864). This Court can see no more of a conflict of interest in Attorney Raikes' participation in this case than the participation of privately employed counsel in the cited cases. At any rate, although Raikes did contribute greatly to the prosecution effort, Mr. Roark conducted the examination of a number of witnesses and made many of the legal arguments which took place outside the hearing of the jury. Certainly, Raikes in no way exclusively assumed the prosecuting attorney's role. *Earl* v. *Commonwealth, supra.*

5. *Improper closing argument.*

Appellants seek reversal because of alleged errors in the introduction of evidence and because of improper closing argument by Attorney Raikes. It is elementary that an objection to the introduction of evidence or to improper remarks in closing argument must be made at the time the evidence was introduced or the remarks made. Incompetent evidence introduced without objection takes on the status of competent evidence. *Burke* v. *Tackett,* Ky., 233 S. W. 2d 115 (1950). Failure to object to improper remarks made in closing argument constitutes a waiver of any impropriety or prejudice. *Cane* v. *Commonwealth,* Ky. App., 556 S. W. 2d 902 (1977), *cert. denied,* 437 U. S. 906, 98 S. Ct. 3094, 57 L. Ed. 2d 1136 (1978). This is true even if the error has constitutional implications. *Salisbury* v. *Commonwealth,* Ky. App., 556 S. W. 2d 922 (1977).

The only error raised on appeal to which an objection was made at the time of trial was to a statement made by Attorney Raikes in his closing argument. The statement and the objection thereto are as follows:

"If someone's daughter is about to be raped, will that person be in a position where he can call upon the representatives of the law that protects you and I and all other law abiding citizens, or will we be at the mercy of the law as interpreted by a three time felon like Buddy Graham."

"Mr. Bailey: Judge, I'm going to have to object to this. He's not interpreting any law."

The trial judge's ruling on this objection is virtually inaudible and this fact was noted at the time of oral argument. However, after again listening to the tape and by isolating the trial judge's microphone and playing the tape repetitively at a slower speed, the remarks became discernible and are as follows:

"The Court: Sustained. This little bit about the rape business is . . . ."

The complaint on appeal is that Raikes' remark that Graham was a three time felon constitutes improper reference to prior convictions, contrary to the teaching of *Cotton* v. *Commonwealth,* Ky., 454 S. W. 2d 698 (1970). However, the fact that Appellant Graham had been convicted of felonies on three previous occasions was volunteered by Graham, himself, in response to a question from his own attorney during direct examination. Needless to say, no objection ws made and no admonition requested. Any prejudical effect from the use of this evidence was waived. *Franklin* v. *Commonwealth,* Ky., 477 S. W. 2d 788 (1972); *see especially Lewis* v. *Commonwealth,* Ky., 318 S. W. 2d 857 (1958).

It might further be noted that defense counsel did not object to Raikes' remarks on the grounds of mention of Graham's prior record, but on grounds that "He's not inter-

preting any law." Where a litigant states a specific reason for his objection, he is held to those reasons and new and different reasons for the exclusion of the evidence may not be asserted for the first time on appeal. *Harris* v. *Commonwealth,* Ky., 342 S. W. 2d 535 (1961).

Of course, the bottom line is that the objection was sustained. Since no admonition was requested, there is no possible error which has been preserved for appellate review. *Taylor* v. *Commonwealth,* Ky., 449 S. W. 2d 208 (1969).

6. *Insufficiency of evidence of resisting arrest.*

The argument of Appellants on this issue has two aspects, viz: (a) that no arrest was ever made, and (b) that Appellants did not resist to the extent contemplated by KRS 520.090. The arguments will be considered in that order.

(a) Appellants argue first that the arresting officers failed to obtain a warrant of arrest before going to the Graham home. However, KRS 431.005(1)(c) permits a peaceofficer to make an arrest without a warrant when he has reasonable grounds to believe that the person being arrested has committed a felony. At the time the arresting officers went to the Graham residence after midnight on November 8, 1979, they had information that a state trooper had been shot and killed by two bullets of different calibre, that a description given by an eyewitness of the person who shot the second bullet fit the description of Clyde Graham, that an automobile owned by Buddy Graham's live-in girlfriend was found a short distance from the crime scene, that Clyde Graham's billfold was found in the automobile, that Clyde Graham, Buddy Graham and Charles McLain had all been together earlier in the day, and that all three men and Carolyn Goodman's car left the Graham home at the same approximate time. This was

sufficient information to give the arresting officers reasonable grounds to believe that Clyde Graham, Buddy Graham and/or Charles McLain had participated in the killing of Trooper Harris. *See Freeman* v. *Commonwealth,* Ky., 425 S. W. 2d 575 (1967); *Church* v. *Commonwealth,* Ky., 411 S. W. 2d 309 (1966).

Appellants' next argument is that the arresting officers failed to comply with KRS 431.025(1), which requires the person making the arrest to inform the person about to be arrested of his intention to arrest him and of the offnse for which he is beng arrested.

However, that statute has always been construed as requiring only substantial compliance. *Hayes* v. *Commonwealth,* Ky., 458 S. W. 2d 3 (1970); *Nickell* v. *Commonwealth,* Ky., 285 S. W. 2d 495 (1956). For instance, it is not necessary to comply with the statute if the person being arrested knows he is being sought by the police and the reason therefor. *Sizemore* v. *Commonwealth,* 279 Ky. 190, 130 S. W. 2d 31, 34 (1939); *Dale* v. *Commonwealth,* 186 Ky. 510, 217 S. W. 363, 364 (1920); *Commonwealth* v. *West,* Ky., 113 S. W. 76, 79 (1908). Neither is compliance with the statute necessary where the defendant begins resisting arrest before the arresting officers have time to give him the necessary notice. *Neal* v. *Commonwealth,* 229 Ky. 832, 18 S. W. 2d 314 (1929); *Tuck* v. *Beliles,* 153 Ky. 848, 156 S. W. 883 (1913).

Although Appellants deny they knew they were suspects in the Harris killing, there was evidence that Jimmy Graham knew Appellants were being sought by the police, that there was sufficient time after Appellants arrived at the Graham home and before the arrest team arrived for Jimmy Graham to have relayed this information to Appellants, and that Buddy Graham called his lawyer during this same interval. From this set of facts, a jury could infer that Appellants knew they were being sought by the police

and the reasons therefor. Where the evidence is conflicting on whether an arrestee knew he was being arrested or whether the arresting officers had time to explain the nature of the charges, the issue should be submitted to a jury under the self defense instruction. *Clemons* v. *Commonwealth,* Ky., 462 S. W. 2d 919 (1971). That is precisely what was done in this case in Instruction No. 5, under which the jury was instructed that they could not find the Appellants guilty of resisting arrest unless they believed beyond a reasonable doubt that the Appellants knew that the state policemen were attempting to arrest them.

It might also be pointed out that in the context of determining at what point an arrestee's constitutional rights come into play, it has been held that an arrest, to be effective, does not require formal words of arrest or station-house booking. The arrest occurs when the defendant is seized, held at gunpoint, deprived of his freedom of action, or told that he is being detained. *United States* v. *Hensley,* 374 F. 2d 341 (6th Cir. 1967); *United States* v. *Baxter,* 361 F. 2d 116 (6th Cir. 1966). If that rule applies in the case where the defendant claims he has been arrested and thus is entitled to his rights under the Fifth and Sixth Amendments, then it seems logical it should also apply in a case like this, where the Defendants claim they have not been arrested and thus are entitled to resist with impunity—which brings us to the second issue, *i.e.* whether the Appellants did in fact resist.

(b) Resisting arrest has always been a common law offense or a form of the common law offense of obstructing justice. It has not always been required that the accused use force or violence in the commission of the offense. It was sufficient that there was some conduct engaged in with an intent to prevent the officer from effecting an authorized arrest. This conduct could consist of force and violence, or a refusal to cooperate in the arrest procedure; and it

was immaterial whether such conduct was categorized as active or passive. *See generally* 67 C.J.S. *Obstructing Justice* sec. 13. Although Kentucky law prior to 1920 is sparse, it does appear that the common law offense of resisting arrest was recognized here. *Hawkins* v. *Commonwealth,* 53 Ky. 395, 14 B. Mon. 318 (1854).

In 1920, the Kentucky Legislature enacted a law making it a felony to disturb, hinder, obstruct, or intimidate an officer while engaging in the discharge of his duties as such by violence, force, or threats. Carroll's Ky. Stat. Sec. 1148a-7. In *McGeorge* v. *Commonwealth,* 237 Ky. 358, 35 S. W. 2d 530 (1931), the evidence of the Commonwealth showed that when a police officer attempted to arrest the defendant for public intoxication, the defendant kept pulling loose, cursed and declared that he would not go to jail. It was held in that case that "force" as used in the statute, means the exercise and application of physical power. Thus, although cursing was held not to be within the scope of its meaning, the act of jerking away from the officer and thereby resisting the arrest was conduct proscribed by the statute. The statute subsequently was declared unconstitutional on the technicality that resisting arrest was not comprehended by the title of the act, which identified it was a statute pertaining to sedition and criminal syndicalism. *Loveless* v. *Commonwealth,* 241 Ky. 82, 43 S. W. 2d 348 (1931). However, it was held in that case and in the subsequent similar case of *Richardson* v. *Commonwealth,* 242 Ky. 64, 45 S. W. 2d 823 (1932) that the indictment should not be dismissed, because it was sufficient to charge the defendant with the common law offense of obstructing justice. When the Kentucky statutes were revised in 1942, sec. 1148a-7 was omitted in its entirety.

In 1968, the General Assembly again enacted a statute relating to the crime of resisting arrest. KRS 432.445 (Acts 1968, ch. 107). When the penal code was adopted in

1974, that statute was reenacted almost verbatim as KRS 520.090 (Acts 1974, ch. 46, sec. 178). The statute defines resisting arrest as follows:

> "1. A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color of his official authority, from effecting an arrest of the actor or another by:
>
> (a) Using or threatening to use physical force or violence against the peace officer or another; *or*
>
> (b) Using any other means creating a substantial risk of causing physical injury to the peace officer or another." (Emphasis added.)

Compare this language with that of the Commentary:

> "The offense of resisting arrest includes only forcible resistance and excludes other forms of nonsubmission to authority. Neither flight from arrest nor passive resistance are punishable under this section since a peace officer has the available remedy of use of reasonable force to effect the arrest. Criminal sanctions are, therefore, needed only when interference with arrest poses a direct threat to the safety of the officer or of another person."

The Commentary has been held to be conclusive in interpreting the penal code. *Kennedy* v. *Commonwealth,* Ky., 544 S. W. 2d 219, 221 (1977). The problem, however, is in interpreting the Commentary. The use of the conjunctive *or* between subsections (a) and (b) indicates that either of two separate and distinct fact situations could constitute the offense. The most logical interpretation is that if physical force or violence is threatened or used against the arresting officer or another, then it is not necessary that

the force or violence create a substantial risk of causing physical injury to the officer or another. Thus, the sentence in the Commentary which indicates there must be a direct threat to the safety of the officer or another refers only to subsection (b). As for subsection (a), the similarity of its language to that contained in the old Carroll's statute is striking. KRS 520.090 (1) (a) prohibits resisting arrest by using or threatening to use physical force or violence. Carroll's Ky. Stats. sec. 1148a-7 proscribed resisting arrest by violence, force or threats. "Physical force" and "violence" generally are held to be synonymous. *State* v. *Gordon,* 120 Ariz. 172, 584 P. 2d 1163, 1165; *People* v. *Bambaugh,* 48 Cal. App. 2d 791, 120 P. 2d 703, 706; *State* v. *Wells,* 31 Conn. 210, 212; *Alexander* v. *State,* 40 Tex. Cr. R. 395, 50 S. W. 716.

Our appellate courts have not yet construed KRS 520.-090 (1) (a). However, the similarity in meaning and obvious intent of this statute to the old Carroll's statute makes it reasonable to assume that the same interpretation will be placed on the new statute as on the old. Thus, under the *McGeorge* case, *supra,* the offense of resisting arrest cannot be committed by cursing, but it can be committed by the physical acts of jerking or pulling away from the arresting officer.

From the testimony of Sergeant Stewart, Sergeant Edwards and Trooper Cottrell, the jury could believe that when Stewart tried to handcuff Buddy Graham, Graham resisted by swinging his free arm and attempting to get to his feet to the extent that it required all three police officers to subdue and handcuff him. Under the *McGeorge* definition, this was sufficient evidence of resistance by physical force or violence to sustain the conviction.

As for McLain, both Sergeant Wyatt and Trooper Antle testified that he got off the ground in an apparent effort to go to the aid of Buddy Graham, that he physically

fought with the arresting officers and had to be physically subdued before he could be handcuffed. Under *McGeorge*, this constitutes sufficient evidence of resistance by the use of physical force or violence to sustain the conviction against him.

7. *Insufficiency of evidence of disorderly conduct.*

KRS 525.060 provides in pertinent part as follows:

(1) A person is guilty of disorderly conduct when in a public place and with intent to cause public inconvenience, annoyance or alarm, or wantonly creating a risk thereof, he:

(a) Engages in fighting or in violent, tumultuous or threatening behavior; or

(b) Makes unreasonable noise; . . .

* * *

The first issue to be resolved is whether the conduct of the Appellants while being arrested was sufficient to warrant a conviction for two separate statutory violations, or whether the double convictions in this case violate the Constitutional prohibitions against "double jeopardy." U.S. Const., Amend. 5, Ky. Const., sec. 13. Long before the adoption of our present Constitution, it had become a maxim under the common law that, "No man is punished twice for the same offense." In administering, construing and applying that maxim, the courts of this Commonwealth have declared that the prosecution may not split up a set of facts and carve out of them multiple offenses (statutory or otherwise) by founding or basing them on parts of an entire set of facts, which parts are necessary ingredients and elements of the offense as embraced by the entire facts. *Rogers* v. *Commonwealth*, 257 Ky. 495, 78 S. W. 2d 340, 341 (1935). The test of whether the offenses are identical, or

severable and distinct, is whether the same evidence is required to sustain them both. If the same elements of offense number 1 are necessary elements of offense number 2, then offense number 1 merges into number 2. *Sherley* v. *Commonwealth,* Ky., 558 S. W. 2d 615 (1977); *Rayburn* v. *United States,* 234 F. 2d 368 (6th Cir. 1956); *United States* v. *Runion,* 47 F. Supp. 594 (E.D. Ky. 1943). These common law interpretations are codified in KRS 505.020 (1)(a) and (2)(a), which provide that a defendant may not be convicted of more than one offense if one offense is established by proof of the same or less than all of the facts required to establish the commission of the other offense.

Except for the facts relied upon to prove resisting arrest, the only actions of the Appellants relied upon to prove disorderly conduct consist of certain exclamations. A search of the record reveals the totality of the evidence in this regard to be as follows:

1. Trooper Antle testified that when he came upon the scene, Appellant McLain was fighting with two officers and Antle overheard McLain exclaim "You son-of-a-bitches can't handcuff me."

2. Trooper Stiles testified that when Buddy Graham came out of his house, he exclaimed "You son-of-a-bitches, I have already called my attorney."

3. Detective Creekmore, Trooper Foster, Sergeant Stewart and Sergeant Edwards testified that when Sergeant Stewart approached Graham to forcibly shove him to the ground, Graham exclaimed "Get your goddamn hands off me."

4. Detective Slack testified he heard some profanity, but could not say by whom it was uttered.

5. Sergeant Wyatt, the arresting officer, testified he heard some "conversation", including "some cuss words", but couldn't tell by whom the cuss words were uttered.

As indicated *supra,* cursing is not an element of the offense of resisting arrest. Remember, resisting arrest is a Class A misdemeanor. Disorderly conduct is a Class B misdemeanor, thus the lesser offense in this case. If it were otherwise, the evidence of "physical force and violence" used to prove Appellants were resisting arrest would obviously merge into the "fighting or violent, tumultuous or threatening behavior" necessary to sustain the conviction for disorderly conduct. Neither should the Commonwealth be allowed to rely on the same conduct to convict for the lesser offense which it relied on to convict for the greater offense. The special prosecutor conceded on oral argument that the Commonwealth had to rely on the *conduct* of the Appellants to sustain the conviction for resisting arrest and the *speech* of the Appellants to sustain the conviction for disorderly conduct.

If a conviction is to be based solely on words uttered by a defendant, the first hurdle to be crossed is a Constitutional one. Freedom of speech is guaranteed by both the United States and Kentucky Constitutions. U.S. Const., Amend. 1; Ky. Const., sec. 1, 8.

The United States Supreme Court has held that a person may not be convicted of disorderly conduct on the basis of mere profanity. *Hess* v. *Indiana,* 414 U. S. 105, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973); *Cohen* v. *California,* 403 U. S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). However, "fighting words", which have a direct tendency to cause acts of violence by the persons to whom they are addressed, are not in the category of protected free speech. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). In the context of a criminal prosecution under Kentucky's former breach of peace statute, KRS 437.010, Kentucky's highest court held that words virtually identical to those uttered by Appellants in this case constituted a breach of peace when directed at an arresting officer. *Jones*

v. *Commonwealth*, 307 Ky. 286, 210 S. W. 2d 956 (1948). *See also Myers* v. *Dunn*, 126 Ky. 548, 104 S. W. 352 (1907). For a compilation of cases from other jurisdictions in which opprobrious words addressed to a police officer were held to constitute a breach of peace, see Annot., 34 A.L.R. 566 (1925).

Kentucky's breach of peace statute was repealed in 1968 after a series of United States Supreme Court cases declared similar statutes in other states unconstitutional for vagueness and overbreadth. *Cox* v. *Louisiana*, 379 U. S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965); *Edwards* v. *South Carolina*, 372 U. S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963). KRS 437.010 was replaced by six separate statutes now found at KRS 525.010 through KRS 525.060. (Acts 1968, Ch. 105, sec. 3; Acts 1974, Ch. 406, sec. 211-216.) Although the purpose of dividing the breach of peace statute into six separate statutes was to overcome the Constitutional infirmities of vagueness and overbreadth, there is nothing in any of those statutes specifically proscribing opprobrious language directed at a police officer. On the other hand, KRS 525.070 (1)(b) provides that a person commits the crime of harassment when with the intent to harass, annoy or alarm another person, he, in a public place, makes an offensively coarse utterance, gesture or display, or addresses abusive language to any person present. Whereas disorderly conduct under KRS 525.060 is a Class B misdemeanor, punishable by both a maximum fine of $250.00 and imprisonment up to ninety days, harassment under KRS 525.070 is merely a violation, punishable by a maximum $250.00 fine, but not by imprisonment. KRS 532.090; KRS 534.040. It appears from this analysis that the Appellants were charged under the wrong statute.

However, the Commentary to KRS 525.060 does suggest that "fighting words" directed at a police officer would constitute disorderly conduct under certain circumstances.

". . . [A] person may not be arrested for disorderly conduct as a result of activity which annoys only the police. The statute is not intended to cover the situation in which a private citizen engages in argument with the police so long as the argument proceeds without offensively coarse language or conduct which intentionally or wantonly creates a risk of public disturbance."

This Commentary obviously was written with an eye toward Kentucky's famous "Shuffling Sam" case. *Thompson* v. *City of Louisville,* 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960). In reversing a conviction for disorderly conduct, for which the appellant was fined $10.00, the United States Supreme Court stated as follows:

"The only evidence of 'disorderly conduct' was the single statement of the policeman that after petitioner was arrested and taken out of the cafe he was very argumentative. There is no testimony that petitioner raised his voice, used offensive language, resisted the officers or engaged in any conduct of any kind likely in any way to adversely affect the good order and tranquility of the City of Louisville."

On the basis of this language in the Supreme Court opinion and the quoted excerpt from the Commentary to this section of the penal code, the Commonwealth argues that the evidence that Appellants raised their voices and used offensive language is sufficient to sustain the conviction for disorderly conduct.

However, the Commentary to KRS 525.060 must be read together with the definition of a "public place" contained in KRS 525.010 (3), which is as follows:

" 'Public place' means a place to which the public or a substantial group of persons has access and includes

but is not limited to highways, transportation facilities, schools, places of amusements, parks, places of business, playgrounds and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. An act is deemed to occur in a public place if it produces its offensive or proscribed consequences in a public place."

The question of what constitutes a "public place" in the context of a disorderly conduct statute has been addressed in other jurisdictions. Connecticut holds that a "public place" under such a statute is a place which members of the public use or attend for reasons of business, entertainment, instructions or the like. *State* v. *Boles,* 5 Conn. Cir. 22, 240 A 2d 920. On the other hand, it has been held in at least three jurisdictions that persons standing on their own property, but directing loud and opprobrious language toward passersby, are guilty of disorderly conduct in a public place. *Republic of Hawaii* v. *Ben,* 10 Haw. 278; *People on Inf. of Hotaling* v. *Dale,* 47 N. Y. S. 2d 702; *Hackney* v. *Commonwealth,* 186 Va. 888, 45 S. E. 2d 241.

During the era of prohibition, Kentucky had a statute, commonly referred to as the Rash Guillian Act, under which it was a public offense to be drunk in any public or private road, passenger coach, street car, or public place or building. Carroll's Ky. Stat. sec. 25554a24 (enact. 1922, ch. 33, sec. 24; repealed Acts 1934, ch. 146, Art. IX, sec. 1). Our highest court carefully construed this statute as applying only to the places specifically mentioned therein. *See, e.g. Cawood* v. *Commonwealth,* 229 Ky. 522, 17 S. W. 2d 453 (1929); *Yarbrough* v. *Commonwealth,* 219 Ky. 319, 292 S. W. 806 (1927). The point in comparing a statute prohibiting public drunkenness, which is not constitutionally

protected, with a statute which, as in this case, is sought to be used to prohibit speech, which is so protected, is that if the former is to be narrowly construed, then the latter certainly should be entitled to the same treatment. Thus, it is reasonable to expect that our highest court would not find that Appellant Graham's front yard is a public place per se.

With all of the above discussion in mind, it is possible to reach an interpretation which gives effect both to KRS 525.010 (3), which requires an act occurring in a private place to actually *produce* its effect in a public place, and the Commentary to KRS 525.060 which permits conviction for offensive language directed at a police officer if that language creates a *risk* of public disturbance. Thus, under these statutes, an argument with the police constitutes disorderly conduct if it takes place in a public place *and* creates a risk of public disturbance; *or,* if it does not take place in a public place, but *actually produces* public inconvenience, annoyance or alarm in a public place. "Shuffling sam" 's argument with his arresting officer actually occurred in a public place but the Supreme Court held it did not create a risk of public disturbance. Appellants in this case had their argument with the police in a private place. *Ergo,* they could not be convicted of disorderly conduct unless there was evidence that the argument actually produced public inconvenience, annoyance or alarm in a public place. Since there was a total absence of any such evidence, the convictions for disorderly conduct must be set aside.

Having determined that the evidence of *all* the witnesses in this case was insufficient to sustain the convictions for disorderly conduct, it is not necessary to determine whether these charges should have been dismissed on the evidence of Sergeant Wyatt alone. Sergeant Wyatt was the arresting officer and KRS 431.005 (1)(d) allows an arrest without a warrant for a misdemeanor only if the misde-

meanor was committed in the officer's presence. He cannot act on mere suspicion or upon information furnished by another. He can only arrest on his own knowledge, obtained through his sight, hearing, or other senses, or by the offender's admission of fact made before the arrest. *See e.g. Cooper* v. *Commonwealth,* Ky. App., 577 S. W. 2d 34 (1979); *Commonwealth* v. *Chaplin,* 307 Ky. 630, 211 S. W. 2d 841 (1948); *Giannini* v. *Garland,* 296 Ky. 361, 177 S. W 2d 133 (1944); *Ingle* v *Commonwealth,* 204 Ky. 518, 264 S. W. 1088 (1924); *Campbell* v. *Commonwealth,* 203 Ky. 151, 261 S. W. 1107 (1924); *Montford* v. *Commonwealth,* 196 Ky. 780, 244 S. W. 293 (1922). As indicated, Sergeant Wwatt testified only that he heard some "conversation" with Buddy and some cuss words, but couldn't say who uttered them. When asked why he charged Appellants with resisting arrest and disoredrly conduct, he replied that he arrested them because "of what I saw take place."

This is not to say that members of the general public, much less those being placed upder arrest, have a right to direct opprobrious language at officers of the law. The harrassment statute, KRS 525.070 (1)(b) presumably would apply to the facts in this case. However, Appellants were not charged with harassment and were not guilty of disorderly conduct.

WHEREFORE, the Judgment of the Hardin District Court is hereby affirmed insofar as it adjudges the Appellants guilty of resisting arrest and assesses the fines recommended by the jury; and is reversed insofar as it adjudges the Appellants guilty of disorderly conduct. The charges of disorderly conduct are hereby dismissed.

This 24th day of June, 1981.

/s/Wm. S. Cooper
Judge, Hardin Circuit Court
Division I

COURT OF APPEALS OF KENTUCKY

No. 81-CA-1398-D

JAMES E. GRAHAM and
CHARLES MCLAIN - - - - - - - *Movants*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondents*

On Motion for Discretionary Review
From Hardin Circuit Court
No. 80-X-20 & 80-X-21

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: WHITE, WILHOIT, and WINTERSHEIMER, JUDGES.

The Court, having considered the motion for discretionary review and being otherwise sufficiently advised, ORDERS that it be, and is hereby, DENIED.

ENTERED: August 25, 1981

/s/ John D. White
Judge, Court of Appeals

SUPREME COURT OF KENTUCKY

81-SC-657-D
(81-CA-1398-D)

JAMES E. GRAHAM and
CHARLES MCLAIN - - - - - - - *Movants*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

Hardin Circuit Court
 # 80-X-20 & 80-X-21

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of James E. Graham and Charles McLain for a review of the decision of the Court of Appeals is denied.

Stephens, J., not sitting.

ENTERED November 17, 1981.

/s/ John S. Palmore
Chief Justice

Opposition

Office - Supreme Court, U.S.
FILED
FEB 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1325

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES E. GRAHAM,
CHARLES McLAIN - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HARDIN COUNTY, KENTUCKY

STEVEN L. BESHEAR
Attorney General

J. GERALD HENRY
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
(502) 564-4044
Counsel of Record for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

TABLE OF CONTENTS

	PAGE
Receipt of Petition	1
Objection to Jurisdiction	1– 5
Counterstatement of the Case and Argument	6
Conclusion	6
Certificate and Proof of Service and of Mailing for Filing	7

TABLE OF AUTHORITIES

Cases: PAGE

Gorman v. Washington University, 316 U. S. 98 (1942) 5

Teamsters Local v. Lucas Flour Company, 369 U. S. 95, at 98-101 (1962) 5

Statutes and Constitutional Provisions:

KRS 23A.080(1) 3, 4

Kentucky Constitution § 112(5) 3

Kentucky Constitution § 109 3

Miscellaneous:

28 U.S.C., § 1257 5

28 U.S.C., § 1257(3) 1–2, 5

Supreme Court Rule 20.1 2

Supreme Court Rule 20.3 ..... 2, 3

Kentucky CR 76.20(1) 4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1325

JAMES E. GRAHAM,
CHARLES MCLAIN - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HARDIN COUNTY, KENTUCKY

RECEIPT OF PETITION

The petition for writ of certiorari was received by respondent on January 14, 1982.

OBJECTION TO JURISDICTION

Petitioners invoke jurisdiction under 28 U.S.C. § 1257(3), which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn

> in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or Commission held or authority exercised under, the United States.

* * *

Petitioners urge that the Circuit Court of Hardin County, Kentucky, is in this instance the highest court of a state in which decision could be had. Respondent agrees that such is the highest court in which decision could be had, and accordingly submits that the petition to this Court is untimely, and thus beyond the Court's jurisdiction.

This Court's Rule 20.1 provides:

> A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort . . . shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. . . .

Rule 20.3 provides:

> The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

The Opinion and Order of Hardin Circuit Court was entered on June 24, 1981. (Appendix to Petition, at pp. 30, 53). Under Rule 20.1, the petition should

have been filed within sixty days of that date, or by Monday, August 24, 1981.

In fact, the petition was mailed for filing more than four and one-half months thereafter, on January 13, 1982. (Petitioners' Certificate of Service).

Pursuant to Rule 20.3, the petition properly cannot be filed.

That both petitioners and respondent agree that the petition is directable to Hardin Circuit Court should be dispositive for this objection to jurisdiction. In the event it is not dispositive, the following alternative comments are made to show that, under applicable law, the parties have correctly identified Hardin Circuit Court as the highest court.

Kentucky, by command of its Constitution, has a four-level system of Courts. From bottom to top, they are District Court, Circuit Court, Court of Appeals and Supreme Court. § 109, Kentucky Constitution.

Petitioners' misdemeanor prosecutions were in Hardin District Court. They appealed those convictions to Hardin Circuit Court, as is provided by Kentucky law under § 112(5), Kentucky Constitution, and KRS 23A.080(1).

Section 112(5) provides:

> The circuit court shall have original jurisdiction of all justiciable causes not vested in some other court. It shall have such appellate jurisdiction as may be provided by law.

KRS 23A.080(1) provides in this regard:

> A direct appeal may be taken from district court to circuit court from any final action of the district court.

This is the only of-right appeal open to petitioners as a matter of Kentucky law. Once that appeal was taken and decided, they had no further of-right procedure available to them for other review.

However, as petitioners have noted, they did have an opportunity for later *discretionary* review.

Kentucky CR 76.20(1) provides:

> A motion for discretionary review by the Supreme Court of a decision of the Court of Appeals, and a motion for such review by the Court of Appeals of a judgment of the circuit court in a case appealed to it from the district court, shall be prosecuted as provided by this Rule 76.20 and in accordance with the Rules generally applicable to other motions. *Such review is a matter of judicial discretion and will be granted only when there are special reasons for it.* (Emphasis added).

Therefore, the only of-right appeal open to petitioners from this District Court misdemeanor conviction was to Hardin Circuit Court. That court exhaustively reviewed their claims, affirming in part and reversing in part, the result being that petitioners were guilty of resisting arrest, and fined, without further penalty or sentence.

Because there was no other of-right entitlement to further review, the Hardin Circuit Court, as petition-

ers assert here, is the highest court in which decision could be had, under 28 U.S.C. § 1257(3).

This analysis involving of-right review vis-a-vis the possibility of discretionary review is precisely supported by this Court's opinion in *Teamsters Local* v. *Lucas Flour Company,* 369 U. S. 95, at 98-101 (1962).

In that opinion, this Court rejected a jurisdictional claim that decision by Department One of the Supreme Court of Washington was not "rendered by the highest court of a State in which decision could be had," under 28 U.S.C. § 1257, that rejected claim being based upon the view that a further petition for *discretionary* rehearing en banc was available.

In so deciding, this Court distinguished its earlier opinion in *Gorman* v. *Washington University,* 316 U.S. 98 (1942), where in Missouri there existed a state constitutional right to a further en banc rehearing by that state's Supreme Court. This Court then ruled that the procedure in the State of Washington is not "of-right" but discretionary. Because of that discretion, it was concluded that the Department One decision was the final word available in that state.

Such is the case here. The only review beyond Hardin Circuit Court was discretionary, not of-right. The petition in regard thereto is jurisdictionally out of time by more than four and one-half months, and cannot be entertained under the law of this Court.

COUNTERSTATEMENT OF THE CASE AND ARGUMENT

Because of the above objection to jurisdiction, respondent will make no formal counterstatement of the case. Instead, respondent will notice all the facts of evidence set out by Hardin Circuit Court in its opinion and order of June 24, 1981. (Appendix to Petition, at pp. 30-53). That opinion shows the existence of considerably more information of record than is set forth in the petition. Such information shows the basis for petitioners' misdemeanor conviction and fines, those fines being the sole sentence or penalty imposed upon the petitioners.

Neither will respondent make a formal argument, instead noticing the wealth of state and federal authority which is included in the opinion of Hardin Circuit Court. (Appendix to Petition, at pp. 30-53).

CONCLUSION

For the foregoing reasons and authority, respondent Commonwealth of Kentucky respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

J. GERALD HENRY
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
(502) 564-4044

Counsel of Record for Respondent

CERTIFICATE AND PROOF OF SERVICE AND OF MAILING FOR FILING

I hereby certify that six copies of this Brief in Opposition to Petition for Writ of Certiorari were served upon petitioners by depositing them in a United States mailbox facility with first-class postage prepaid, addressed to Mr. Jack M. Lowery, Counsel of Record for Petitioners, 231 South Fifth Street, Louisville, Kentucky 40202, this 9 day of February, 1982. All parties required to be served have been served. Forty copies of this Brief in Opposition to the Petition have been mailed for filing in this Court, addressed to the Clerk of this Court, on the same date and by the same method.

J. GERALD HENRY
Counsel of Record for Respondent